

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JUAN ANGEL ENGLAND,

Appellant.

No. 32656-6-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — A jury convicted Juan Angel England of second degree child molestation. England appeals his conviction arguing that the trial court deprived him of his right to a defense by (1) excluding some character witnesses on foundational grounds and (2) preventing him from calling others by ruling that the State was permitted to cross-examine the witnesses regarding their knowledge of England's prior convictions. Because the trial court's rulings were proper, we affirm.

FACTS

The State charged England with one count of second degree child molestation in violation of RCW 9A.44.086.¹ At trial, England offered testimony regarding his reputation for truthfulness

¹ RCW 9A.44.086 provides:

A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

and veracity and sexual morality and decency. The State moved in limine to exclude the evidence, but the trial court ruled that England would be allowed to present the testimony, provided that he first laid a proper foundation for each witness.

England called five character witnesses: Lola Bailey, David England, Melody Lambert, Paris Conway, and Scheneitha Franks. The trial court concluded that England did not lay the proper foundation to admit Bailey and Franks's testimony. But it held that he laid an adequate foundation to admit Lambert's testimony regarding England's reputation for truth and veracity and sexual morality and decency; and David England and Conway's testimony regarding England's reputation for truthfulness and veracity.

During pre-testimonial voir dire, Conway stated that England had "always been really honest" and had "never done anything wrong." 4 Report of Proceedings (RP) at 290. Citing ER 405, the State asked to cross-examine Conway on his knowledge of England's two prior convictions for hit and run unattended and driving while under the influence (DUI). Over England's relevance objection, the court ruled that if Conway testified to England's character, the State could ask Conway about his knowledge of England's prior convictions, explaining that: "it seems as though the basis for [Conway's] opinion was his discussions within the community and his opinion that the defendant had never done anything wrong; so I will allow it." 4 RP at 303. Because of this ruling, the defense called only Lambert and David England to testify as character witnesses. It did not call Conway to testify.

The jury found England guilty as charged. Before sentencing, England moved for a new trial based on (1) the trial court's exclusion of the reputation testimony; (2) the trial court's ruling

allowing the State to cross-examine Conway about his knowledge of England's two prior convictions; and (3) the trial court's refusal to instruct the jury on the lesser offense of fourth degree assault.²

The court denied England's new trial motion stating:

With regard to the [character] witnesses, we went through each of those witnesses one by one. . . . I carefully listened to give Mr. England an opportunity to present all of the factually and legally relevant testimony that he possibly could. [His attorney] had free rein to ask all of the witnesses questions that he needed to. There was effective cross-examination of the witnesses. I made the decisions that I did based on the testimony they gave and based on the rules of evidence at the time. So I believe that was proper.

7 RP at 412.

The trial court sentenced England to a standard sentence range of 15 months. England appeals.

In this appeal, we address two issues: (1) whether the trial court abused its discretion by excluding England's proposed character witness testimony; and (2) whether the trial court abused its discretion by allowing the State to cross-examine Conway about his knowledge of England's criminal history.

Analysis

Exclusion of Character Witnesses for Lack of Proper Foundation

England argues that the trial court denied him the right to present his defense by excluding character testimony from Bailey, David England, and Franks regarding England's reputation for truthfulness and veracity and sexual morality and decency. We disagree.

² England does not challenge the trial court's jury instructions on appeal.

ER 404(a)(1) permits a defendant to introduce evidence of his character if it is pertinent to the crime charged.³ *State v. Kelly*, 102 Wn.2d 188, 193-95, 685 P.2d 564 (1984). ER 405 defines the acceptable methods of introducing evidence of a defendant's pertinent character trait. *Kelly*, 102 Wn.2d at 194. Such proof must be made through testimony of a character witness who is knowledgeable about the defendant's reputation in the community for the specific character trait at issue. *See also State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997); 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 405.2, at 3 (4th ed. 1999) (citing *State v. Argentieri*, 105 Wash. 7, 177 P. 690 (1919)).

A party seeking to admit reputation testimony must first lay a foundation establishing that the witness is familiar with the person's reputation and that his testimony is based on the community's perception of that person as regards the relevant character trait. *Callahan*, 87 Wn. App. at 935. The witnesses' personal opinion is not competent testimony nor is it an adequate foundation to admit reputation evidence. *Kelly*, 102 Wn.2d at 195 (Washington does not permit proof of character by opinion).

We review a trial court's decision regarding the adequacy of the foundation necessary to admit evidence for an abuse of discretion. *Callahan*, 87 Wn. App. at 934. On appeal, the party offering the evidence must prove the trial court abused its discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds

³ ER 404(a) states:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
(1) . . . Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

or reasons. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 687 (1993).

Bailey

England maintains the trial court abused its discretion by excluding Bailey's testimony regarding England's character for truthfulness and sexual morality. During voir dire, Bailey testified that she had known England for five years, that she frequently had contact with him, that she observed him numerous times around children, and that England had a good reputation in the community for truthfulness and sexual morality. She stated that she had not seen anything "inappropriate or unacceptable." 3 RP at 230. But on cross-examination, she admitted that she had never discussed England's reputation for truthfulness and sexual morality with anyone. She asserted that if something about England was going around the community, she would have heard about it because people talk to her. Essentially, because she had not heard anything negative about England, she assumed that there was nothing negative to be known.

Bailey's answers reveal that her good opinion of England was based on her assumption that if England's reputation was bad, she would have known. Her opinion was not based on knowledge that England's reputation was good.⁴ Contrary to England's argument, the evidence does not establish a proper foundation for the admission of Bailey's proposed testimony

⁴ Bailey's assumption alone cannot be used here to establish the proper foundation because England did not establish that Bailey was indeed situated in the community in a manner such that her lack of knowledge about England's character traits establishes that there was nothing negative to be known. *State v. Arine*, 182 Wash. 697, 698-99, 48 P.2d 249 (1935) (party establishing foundation through negative testimony must show that the witness was qualified to speak on the subject by showing that the witness was so situated within the community that he would likely have heard any comments concerning the defendant's character).

regarding England's reputation for truthfulness and sexual morality. We agree with the trial court that Bailey personally knew and observed England and had strong opinions about him. But because Bailey had never discussed England's reputation for truth and veracity and sexual morality and decency, the foundation was not laid to allow the trial court to admit her testimony regarding England's reputation in the community for these character traits.

David England

England maintains that he not only laid the proper foundation for his brother, David England, to testify regarding England's reputation for truthfulness and veracity, but also for his testimony regarding England's reputation for sexual morality. Thus, England argues that the court abused its discretion when it refused to allow David England to testify to England's reputation for sexual morality. Again, we disagree.

When asked during voir dire about whether he was familiar with England's reputation for sexual morality and decency, David England replied, "I don't -- he's just a good -- good person." 3 RP at 237. David England went on to say that he had spoken with people about his brother's reputation for sexual morality and decency, he had observed England around children, and his behavior was that of a role model and a good uncle to his nephew. On cross-examination, however, David England admitted that he had not talked to anyone about England's sexual morality and decency specifically.

Thus, because David England had not talked to anyone in the community about England's reputation for sexual morality and decency, he could not testify to England's

reputation in the community for those character traits, and the trial court did not abuse its discretion in excluding David England's testimony on that issue for lack of foundation.

Franks

Franks is England's stepdaughter. England maintains that he laid the proper foundation for Franks's testimony regarding his reputation for truthfulness and veracity and sexual morality and decency. Again, we disagree.

During voir dire, Franks testified that England had a good reputation for truth and veracity and that people trusted him. Franks also stated that she had talked with her friends and family about it. But on cross-examination, Franks admitted that she had not specifically discussed England's truthfulness with others, but she knew that people trusted him and that "nobody ever has anything bad to say about him." 4 RP at 299. As for his reputation for sexual morality, Franks stated that England had been around her children and her friends' children and that he babysat for her and her friends. Although she admitted that she had never discussed his sexual morality with anyone, she argued that she knew England's reputation for sexual morality because he had never made a pass at her or her friends and because no one had ever told her they felt uncomfortable around England.

Explaining its reason for excluding Franks's testimony, the trial court stated:

I didn't hear the foundation. . . . [This witness] was less specific about who she talked to.^[5] She couldn't give any specific instances of conversation or how she came about this information, either for the defendant's reputation for truth and

⁵ Other witnesses who were permitted to testify to England's character specifically mentioned the names of people they have talked to about England and how the conversation arose.

voracity [sic] or regarding his reputation for sexual morality and decency. . . . She wasn't specific enough.

4 RP at 301.

Because Franks had not talked to anyone within the community about the character traits at issue, she could not testify to these traits at trial. Thus, the trial court did not abuse its discretion in excluding her proposed testimony.

England had the burden to provide an adequate foundation to admit evidence of his reputation. Because both Bailey and Franks never discussed England's reputation with members of the relevant community, and David England never discussed England's reputation for sexual morality and decency, the witnesses had no first-hand knowledge of England's reputation. Their testimony regarding England's reputation for these character traits was solely their opinion and, as such, inadmissible. Thus, the trial court properly found that England failed to lay an adequate foundation to admit the proffered testimony. The trial court did not err by excluding it.

State's Cross-Examination of Conway Regarding England's Prior Convictions

England also challenges the trial court's ruling permitting the State to cross-examine Conway about England's convictions for DUI and hit and run unattended. He argues that the ruling deprived him of his right to present his defense because he could not call Conway to testify on his behalf without the jury learning of his prior offenses. Citing ER 608, he asserts that because the prior convictions were not for crimes involving dishonesty, they have no bearing on his character for truthfulness and were inadmissible for impeachment purposes.

The admission or exclusion of evidence lies within the trial court's discretion which we will not disturb absent a showing of an abuse of that discretion. *State v. Rehak*, 67 Wn. App.

157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). England's argument improperly relies on ER 608. At trial, England did not cite ER 608 and that rule does not apply because the State did not offer the evidence to impeach England.⁶ After Conway indicated during voir dire that he could testify to England's good character because England is "always helpful, . . . always been really honest, [and] never -- never done anything wrong" (4 RP at 290), the State was entitled to challenge Conway's testimony under ER 405 by inquiring whether in making this statement he was aware of England's prior convictions. ER 405.

ER 405 permits a party to test proffered reputation evidence by inquiring into the character witnesses' basis and breadth of knowledge, including prior criminal convictions of the person whose reputation the witness is testifying about. Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 405.6 at 13 (4th ed. 1999); *accord State v. Lord*, 117 Wn.2d 829, 891-92, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); *State v. Styles*, 93 Wn.2d 173, 175-76, 606 P.2d 1233 (1980); *State v. Donaldson*, 76 Wn.2d 513, 519, 458 P.2d 21 (1969). When cross-examining a character witness as to his personal knowledge of acts of misconduct by the accused, the examining questions should be made in good faith belief of the

⁶ Even if it did apply, England's ER 608 argument is not preserved for our review. *State v. Kimp*, 87 Wn. App. 281, 941 P.2d 714 (1997), *review denied*, 134 Wn.2d 1020 (1998). A witness must testify in order for a defendant to appeal a trial court's ER 608 ruling allowing the prosecutor to cross-examine about specific instances of conduct bearing upon the witnesses' credibility. *Kimp*, 87 Wn. App. at 284-85. By not calling Conway as a witness, England waived his right to challenge the trial court's preliminary ruling.

accuracy of the information and prefaced “by either ‘Did you hear,’ ‘Have you heard,’ or ‘Do you know.’” *Styles*, 93 Wn.2d at 175-76 (quoting *Donaldson*, 76 Wn.2d at 519). The purpose of such inquiry is to discredit the basis of the character witnesses’ testimony, not to disparage the character of the accused. *Styles*, 93 Wn.2d at 176. Because the balance between discrediting the witness and disparaging the defendant is delicate, we leave the question of whether the State’s questioning on cross-examination upsets this balance to the trial court as it is in the best position to evaluate the State’s cross-examination motives. *Styles*, 93 Wn.2d at 176. The defendant who elects to call witnesses to testify to his character assumes the risk that events from his past may be revealed to provide the depth of that witnesses’ knowledge of the subject. *Styles*, 93 Wn.2d at 176.

Here, the trial court did not abuse its discretion by ruling that the State could cross-examine Conway regarding his knowledge of England’s prior convictions should he testify that England had “never done anything wrong.” 4 RP at 290.

Cumulative Error

Lastly, England contends that the cumulative error doctrine mandates reversal. The cumulative error doctrine protects a criminal defendant’s right to a fair trial and applies only when a trial contains numerous egregious errors. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). But since the trial court did not err, the cumulative error doctrine does not apply. *Jackson*, 150 Wn.2d at 276.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HOUGHTON, J.

VAN DEREN, J.